

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KYLE GIANIS,

Defendant.

NO. CR04-334RSM

GOVERNMENT'S RESPONSE TO  
DEFENSE MOTION IN LIMINE

**I. INTRODUCTION**

The United States of America respectfully submits this response to Defendant's Motion in Limine (Dkt. # 38). The government does not intend to introduce many of the categories of evidence covered by the motion, and therefore does not oppose it as such. As to others, the government offers the following response.

**II. BACKGROUND**

The basic background is set forth in the government's trial brief and other prior filings, and will not be repeated in the interests of brevity.

**III. LEGAL ANALYSIS**

The government will respond to Defendant's motion in the same order as set forth in the motion.

1           **1. Defendant's Criminal History or Arrest Record.**

2           The government does not intend to directly introduce any reference to  
3 Mr. Gianis' prior record in its case in chief, and to that extent does not object to the  
4 motion in limine. However, it is incorrect to state that the Defendant has "no criminal  
5 convictions." The quote referred to in Defendant's motion is taken out of context; it  
6 refers to one query from one of a number of Canadian databases.

7           According to information provided by Pretrial Services, Gianis has a number of  
8 prior convictions, including a March 25, 1999 conviction for Assault, in which he  
9 received nine months probation (a juvenile conviction); an April 25, 2001 conviction for  
10 possessing a controlled substance, for which he received one year probation (apparently  
11 also as a juvenile); and a June 15, 2005 conviction for possessing a firearm, for which he  
12 received 30 days. In addition, Gianis has an extraordinarily long list of arrests and other  
13 contacts with law enforcement, including multiple shooting incidents. Indeed, if one  
14 "Googles" the name "Kyle Gianis," the top hits are articles in two Canadian newspapers  
15 about a shooting incident at his home, and how his neighbors fear the defendant. One of  
16 the articles refers to his prior conviction for possessing a prohibited firearm.

17           The government does reserve the right to refer to Mr. Gianis' prior firearm  
18 conviction in the event he testifies on his own behalf during cross-examination, and/or if  
19 he calls a character witness of any type.

20           The government also reserves the right to refer to Mr. Gianis' criminal history and  
21 reputation for violence generally, in response to any defense argument that Youngberg  
22 and Tsoukalas somehow conspired to "frame" Mr. Gianis, which appears to be the  
23 defense theory. It is hardly credible to suggest that Youngberg and Tsoukalas decided to  
24 frame a man who had a well-known propensity for violent acts.

25           **2. References by Witnesses Tsoukalas and Youngberg to the Defendant**  
26           **being a Drug Dealer.**

27           The government does not intend to introduce the precise statements referred  
28 to by the defense in its motion. However, the government does intend to introduce

evidence of specific prior drug dealings between Tsoukalas and Gianis in Canada, specifically (a) that Tsoukalas purchased steroids from Gianis in the past, and (b) that Tsoukalas and Youngberg did a marijuana deal together shortly before the incident that lead to this case. These prior dealings provide the background of the charged offense. They also rebut an argument the defense made during the prior depositions in this case, that it was unlikely that Mr. Gianis would have approached a mere acquaintance such as Tsoukalas to move drugs over the border. Their prior drug deals provide the basis for why Gianis would have thought Tsoukalas would be willing and able to undertake to smuggle drugs over the border.

### **3. Circumstances of Defendant's Arrest.**

The government does not intend to introduce the circumstances of his arrest as such. However, it will seek to introduce a statement defendant made to arresting agents. That statement is the subject of another pending motion.

### **4. Anonymous Letter.**

The government does not intend to introduce the letter.

### **5. Observations of Mr. Gianis' Brother.**

The government does not intend to introduce this evidence in its case in chief. It may seek to introduce this evidence during cross-examination of either the defendant or his brother Nicolas, or in rebuttal.

### **6. Motion to Limit DEA Expert Testimony.**

Defendant seeks to limit (although not prohibit) expert testimony by Special Agent Errin Jewell, who will testify as an expert in drug trafficking methods. The Court should reject this request.

Under Federal Rule of Evidence 702, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto.” The decision to admit expert testimony “is committed to the discretion of the [trial] court and will not be disturbed [on appeal] unless manifestly

erroneous." United States v. Kinsey, 843 F.2d 383, 388 (9th Cir. 1988), reversed on other grounds, United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000). To the extent that an expert's testimony is based upon information obtained other than through personal observation, it is permissible if it is based upon information of the type reasonably relied upon by experts in forming expert opinions. See United States v. Golden, 532 F.2d 1244 (9th Cir. 1976) (holding it proper to admit DEA agent's testimony about market value of methamphetamine where that testimony was based in part upon information obtained from other undercover agents, because such information is of the type reasonably relied upon by experts determining prevailing prices in clandestine markets).

The Government intends to call Special Agent Errin Jewell as an expert witness at trial, and has provided appropriate notice to the defense of the subject matter of his testimony. Agent Jewell, an experienced DEA agent, will provide opinion and expert testimony regarding the *modus operandi* of drug trafficking organizations, drug quantities typically associated with distribution, and the monetary value of the controlled substances seized during this investigation. He may also offer expert testimony in the following general areas of narcotics trafficking, among others: common narcotics packaging and storage methods; and methods used to avoid detection of drug trafficking.

"Courts have overwhelmingly found police officers' expert testimony admissible where it will aid the jury's understanding of an area, such as drug dealing, not within the experience of the average juror." United States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996). The Ninth Circuit has explained the basis for such expert testimony as follows:

We have held that drug-enforcement experts may testify that a defendant's activities were consistent with a common criminal *modus operandi*. This testimony helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior. Further we even allow *modus operandi* expert testimony in cases that are not "complex."

United States v. Webb, 115 F.3d 711, 713-14 (9th Cir. 1997)(citing United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984) ("[G]overnment agents or similar persons may testify as to the general practices of criminals to establish the defendants' *modus*

1 *operandi.*”); United States v. Gill, 58 F.3d 1414, 1422 (9th Cir. 1995) (rejecting  
 2 contention that *modus operandi* testimony was improper because the activities described  
 3 were not “complex ones requiring expert explanation”).

4 Thus, the Ninth Circuit consistently has affirmed the admission at trial of expert  
 5 testimony by experienced law enforcement agents concerning various facets of the drug  
 6 trade. See, e.g. United States v. Plunk, 153 F.3d 1001, 1016-17 (9th Cir. 1998) (proper  
 7 for police detective to testify as expert witness “in the field of narcotics trafficking,  
 8 including wiretapping investigations, analysis of codes, words, and references by  
 9 narcotics traffickers”; witness allowed to testify regarding general usage of cryptic  
 10 terminology by drug dealers, and to interpret encoded conversations involving defendant  
 11 and his coconspirators); United States v. Figueroa-Lopez, 125 F.3d 1241, 1245-46  
 12 (9th Cir. 1997) (testimony by DEA agent regarding *modus operandi* and other particular  
 13 characteristics of drug traffickers would have been proper if agent was qualified as  
 14 expert; error was to admit testimony as lay opinion evidence); United States v. Simas,  
 15 937 F.2d 459, 464-65 (9th Cir. 1991) (lay opinion testimony admissible that defendant’s  
 16 activities matched “the usual criminal *modus operandi*”); United States v. Espinosa,  
 17 827 F.2d 604, 611-12 (9th Cir. 1987) (expert testimony permissible from police officer  
 18 regarding, (a) defendant’s use of apartment as “stash pad” for drug transactions, and (b)  
 19 the witness’ interpretation of defendants’ ledger books and his conduct during suspected  
 20 drug transactions); United States v. Stewart, 770 F.2d 825, 831 (9th Cir. 1985) (collecting  
 21 cases regarding admission of DEA agent expert testimony regarding counter surveillance  
 22 techniques, use of lookouts at drug transactions, and drug traffickers’ common usage of  
 23 cars and apartments registered in other persons’ names); United States v. Bailey, 607 F.2d  
 24 237, 240 (9th Cir. 1979) (proper for DEA agent to testify as expert witness “regarding the  
 25 meaning and use of code words and commonly used phrases in drug transactions,” where  
 26 witness did not attempt to interpret specific statements made by defendant).

27 The Ninth Circuit similarly has approved of expert testimony regarding drug  
 28 quantity and monetary value. “DEA agents can testify as to the street value of narcotics,

and counsel can argue reasonable inferences from it.” United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994) (holding that “[t]here was no abuse of discretion in admitting the evidence or allowing argument about its significance”) (citations omitted). Thus, the Ninth Circuit consistently has held that testimony from DEA agents concerning the value of narcotics is admissible at trial, especially when defendants are charged with distribution related offenses. See United States v. Golden, 532 F.2d 1244, 1247-48 (9th Cir. 1976) (The value of the drugs found in the bags was relevant to both appellants’ knowledge of the presence of the drugs, and intent to distribute; trial court did not abuse its discretion in permitting the DEA witness to testify as an expert).

**7. Reference to Defendant’s Possession of Firearms and Reputation for Violence.**

The government has already addressed this issue under point 1, *supra*, and that discussion is incorporated by this reference. To the extent that the defendant seeks to suggest that Youngberg and Tsoukalas conspired to “frame” Mr. Gianis, their knowledge of his violent reputation is relevant. It is hardly credible to suggest that the two would seek to falsely accuse someone they sincerely believed would harm them for doing so.

**8. Reference to Defendant’s Alleged Association with Hells Angels.**

The government has information suggesting that Mr. Gianis is actually currently associated with the “Imperial” and/or “UN” gangs, not the Hells Angels. However, the government does not intend to introduce this evidence at trial, and therefore does not object to this part of the motion.

**9. References to Defendant’s Use of or Trafficking in Steroids.**

This issue was discussed under point 2, *supra*, and that discussion is incorporated here by this reference. Briefly, Mr. Gianis’ and Tsoukalas’ prior drug dealing provides the context as to why Gianis approached Tsoukalas about moving the ephedrine over the border. It is therefore relevant and admissible. The Court can, and should, give an appropriate limiting instruction.



CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

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